

## Office of the Attorney General State of Texas

DAN MORALES
ATTORNEY GENERAL

April 26, 1996

Ms. Cynthia J. Hill Chief Counsel Capital Metropolitan Transportation Authority 2910 East 5th Street Austin, Texas 78702

OR96-0610

Dear Ms. Hill:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 38685.

The Capital Metropolitan Transportation Authority ("Capital Metro") received an open records request for "any and all documentation related to the accident involving a Capital Metro bus and Amanda McIntosh on October 12, 1995." You state that some of the documents requested by the requestor are disclosable, therefore we will assume that you have provided the requestor with access to the responsive documents. However, you have submitted the remaining records for our review and contend that section 552.103(a) and/or section 552.101 of the Government Code excepts them from required public disclosure.

Section 552.103(a) excepts from required public disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and,

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

Capital Metro has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. To show the applicability of section 552.103, a governmental entity must show that (1) litigation is pending or reasonably anticipated, and that (2) the information at issue is related to that litigation. Heard v. Houston Post Co., 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Capital Metro must meet both prongs of this test for the information to be excepted under section 552.103(a). Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. Open Records Decision Nos. 551 (1990) at 5; 511 (1988) at 3.

Section 552.103 requires concrete evidence that litigation is realistically contemplated; it must be more than mere conjecture. Open Records Decision Nos. 518 (1989) at 5, 328 (1982). We have examined the information and documents submitted to us for review. In this instance you have failed to submit concrete evidence that litigation is pending or anticipated, for purposes of section 552.103(a). Therefore, the requested records, including "the first, second, and final reports from a post-accident investigation conducted by Capital Metro's insurance adjusters" may not be withheld, except to the extent some information is deemed confidential pursuant to section 552.101 and other provisions of law.

As for Capital Metro's assertion that their adjuster's third/final report, and enclosures, submitted should be excepted from disclosure pursuant to section of 552.101 and confidentiality provisions of the Medical Practice Act, the only item entitled to this exception is the physician's report. Section 5.08(b) of the Medical Practice Act, V.T.C.S. article 4495b, makes confidential "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a physician." See Attorney General Opinion JM-229 (1989) Therefore, we have tagged the one medical record, which may only be released as provided by the Medical Practice Act.

In reviewing the submitted records, it appears that much of the worker's compensation information was obtained from the insurance carrier of the injured's employer. Thus, it is not confidential under section 402.083 of the Labor Code. See Open Records Decision No. 533 (1989). If, however, any of the information was obtained from the Texas Workers' Compensation Commission, then you must withhold the information under section 402.083. Id.

Section 402.083, Labor Code, provides in pertinent part:

(a) Information in or derived from a claim file regarding an employee is confidential and may not be disclosed by the commission except as provided by this subtitle.<sup>1</sup>

Accordingly, if the document that Capital Metro refers to as the "Workers' Compensation Employment report," enclosed with the adjuster's third/final report, was prepared by the Workers' Compensation Commission, pursuant to section 402.083 of the Labor Code, Texas Workers' Compensation Act, then you may withhold the report. However, the other related forms prepared by the injured's employer and furnished to their employee, Workers' Compensation carrier and Workers' Compensation Commission may not be withheld pursuant to the Texas Workers' Compensation Act, section 402.083(a), Labor Code. See Open Records Decision No. 619 (1993).

The remaining submitted records included certain information which may be confidential, pursuant to section 552.101 and other provisions of law, such as employee social security numbers, home address, and medical records. The Open Records Act allows public employees and former employees to choose whether the public has access to their home addresses, telephone numbers and social security numbers. See Gov't Code § 552.024, .117. Employees must state their choice, in writing, within 14 days of starting work, for current employees, or after service ends, for former employees. Gov't Code § 552.024(b). If an employee chooses to close this information, it must be withheld under section 552.117 of the Open Records Act. However, if an employee or former employee does not affirmatively choose to close his home address and telephone number, this information will be subject to public disclosure. Gov't Code § 552.024(d).

Specifically, we note that the submitted information includes social security numbers that may be excepted under section 552.101. A social security number may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). In relevant part, the 1990 amendments to the federal Social Security Act make confidential social security account numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. See Open Records Decision No. 622 (1994).

Based on the information that you have provided, we are unable to determine whether the social security numbers at issue here are confidential under federal law. On the other hand, section 552.352 of the Government Code imposes criminal penalties for

<sup>&</sup>lt;sup>1</sup>Statutes governing access to public records, which govern over specific subset of information, prevail over general access provisions of the Open Records Act. See Open Records Decision No. 619 (1993).

the release of confidential information. Therefore, prior to releasing *any* social security number contained in these documents, you should ensure that it was not obtained pursuant to a law enacted on or after October 1, 1990.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Sam Haddad

Assistant Attorney General Open Records Division

SH/ch

Ref.: ID# 38685

Enclosures: Submitted documents

cc: Ms. Yolanda Ramos

1316 Broadmoor Drive Austin, Texas 78723 (w/o enclosures)